
“Western” Notions of Justice: Legal Outsiders in American Cinema

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“When it comes to justice, the best thing to do is to tell a story about a man or a woman who effects justice, or who suffers for it, or who presumes to run roughshod over it, and to let it go at that.”¹

JUSTICE, LEGAL OUTSIDERS, AND CIVIL SOCIETY

The concept of justice is a dominant theme in traditional Western liberal culture.² Indeed, the ideal of justice has taken on an almost mythic quality in our political and social culture.³ Interestingly, however, the prevailing myth⁴ is not one where the possibility of finding justice lies in relying upon or utilizing the public institutions of Western society.⁵ Instead, some of our most important cultural artifacts often go to great lengths to point out how finding justice in social and political institutions is seemingly impossible. The dominant message appears to be that justice is something found outside accepted social

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1. JOHN D. CAPUTO, *DEMYTHOLOGIZING HEIDEGGER* 191 (1993).

2. See generally BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* ch. 8 (3d ed. 2004).

3. For an excellent discussion of the mythic nature of justice, see CAPUTO, *supra* note 1, at 189-92.

4. Richard Slotkin discusses the importance that myth has played in the context of film (and particularly Westerns). See RICHARD SLOTKIN, *GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA* 1-26 (1998).

5. For an excellent discussion of the preoccupation filmmakers have historically had with this question, see Jessica Silbey, *A History of Representations of Justice: Coincident Preoccupations of Law and Film*, in *REPRESENTATIONS OF JUSTICE* 44-51 (A. Masson & E. O’Conner eds., 2007).

institutions, if it is to be found at all. Beyond this is the underlying perception that social institutions are often obstacles to the possibility of attaining justice. Civil society, then, is not the path to justice. In fact, many of the cultural messages we are exposed to suggest that following the bounds of civil society actually makes it less likely that justice will be attained.⁶ Law, as a socio-political institution, and more specifically the judicial system, are frequent focal points for such criticism.⁷

These particular themes have found their way into all manner of cultural phenomena and are notably prevalent in several movie genres. Virtually every genre of film plays on this theme at some level, particularly Film Noir.⁸ Other genres such as science fiction, action adventure, and drama draw upon this trope as well, some of them in unexpected ways.⁹ Film, as a prominent cultural artifact, continually reinforces the notion that looking to the institutions of civil society as a path to attaining justice is at best naïve, and at worst disastrous.¹⁰ Western films are especially noteworthy in this regard, wherein the inability of law and the judicial system to maintain order and bring about justice is a recurrent motif.¹¹ In fact, the tension between this ineffectiveness on the part of legal institutions and the desire for justice on the part of principal characters is absolutely central to many of these movies.¹²

A recurring theme within the genre of Western films concerns the nature of the relationship between the protagonists who effect justice—or at least try to—and the legal and social establishment. Very often justice is brought about, can only be brought about, by those who are acting outside the bounds of official civil society.¹³ These “legal outsiders” play an important part in the narratives of justice in American Westerns.¹⁴ By legal outsider I mean characters that are not acting under the color of law: solitary souls who have

6. *Id.*

7. *Id.*

8. See TOUCH OF EVIL (Universal International Pictures 1958) as a representative sample.

9. See generally BLADE RUNNER (The Ladd Company 1982); BRAZIL (Embassy International Pictures 1985). Other less obvious examples can be found in fantasy, romance, and even comedy films. See INTOLERABLE CRUELTY (Universal Pictures 2003). Very often, the critique is not a direct one; the message seems to be that what we traditionally understand as civil society is unable to provide us with justice. This is particularly true of films that focus on margins (e.g., dystopias, science fiction films, and Westerns). An interesting take on this is the comedy BLAZING SADDLES (Crossbow Pictures 1974), where the themes explored in this paper are toyed with in hilarious ways.

10. This is frequently the case in films that are set in post-apocalyptic settings. See MAD MAX (Kennedy Miller Productions 1979).

11. See SLOTKIN, *supra* note 4, at Part III.

12. A good example of this is HIGH PLAINS DRIFTER (The Malpaso Company 1973).

13. Westerns frequently employ the theme of townspeople who live on the outskirts of civilization relying upon a solitary, detached hero who acts outside the established institutions of civil society in order to bring about justice. See Cheyney Ryan, *Print the Legend: Violence and Recognition in The Man Who Shot Liberty Valance*, in LEGAL REELISM: MOVIES AS LEGAL TEXTS 23, 24-33 (1996).

14. See *id.* (discussing central role of “outsider”); see also SLOTKIN, *supra* note 4, at 379-82 (distinguishing between “town-tamer” and “outlaw” Westerns).

their own checkered histories with the establishment, yet still maintain a deep and abiding personal sense of justice and fairness. By contrast, characters in Westerns that represent the established legal institutions of civil society invariably display characteristics that have nothing to do with justice: corruption, cowardice, decadence, moral ambivalence, physical infirmity, and weakness of spirit.¹⁵ The hero in most Western films is not the sheriff, judge, or mayor, but is instead the quiet, solitary, and somewhat shady character that lives on the edge; literally (on the edge of town) and figuratively (being philosophically opposed to the establishment). If justice is to be had, it is this character that must bring it about. Characters who rely on the agents who represent the established institutions to help them in their quest for justice are portrayed as fools, and they usually get what they deserve for being so naive.¹⁶ In American Western films, then, legal outsiders have a much closer association to justice than do the established legal officials. We are invariably left thinking, as are many of the ancillary characters in the films: "What good are these guys (the sheriff, the lawyer, the mayor) if they cannot give us justice?"

Exploring this question in the context of cinema gives us a rich body of work from which to draw.¹⁷ The narratives found in Western films are closely associated with the American zeitgeist¹⁸ and give us a glimpse into the prevailing social anxieties with which our culture struggles.¹⁹ Amnon Reichman has recently said that "cinematic theory can tell us something meaningful about the production of law."²⁰ In other words, by exploring narratives in popular media such as movies and television about law (and the rhetorical practices of those who make these films and shows) we can understand more about the institution of law as a social and cultural phenomenon.²¹ I believe this is clearly the case. This sort of evaluation, drawing on the groundbreaking work of Jessica Silbey, can be identified as

15. An excellent example is the character of Town Marshal Link Appleyard (brilliantly played by Andy Devine) in *THE MAN WHO SHOT LIBERTY VALANCE* (Paramount Pictures 1962). Appleyard, in fact, seems to display all of these characteristics at one point or another in the film. See Ryan, *supra* note 13, at 24-25 (describing Appleyard as "infantile" and "naïve"). A more recent example of this can be found in William Sanderson's portrayal of Mayor E.B. Farnum in the HBO series *Deadwood* (Home Box Office 2004-2006).

16. Ryan, *supra* note 13, at 29.

17. See Amnon Reichman, *The Production of Law (and Cinema): Preliminary Comments on an Emerging Discourse*, 17 S. CAL. INTERDISCIPLINARY L.J. 457, 457 (2008). See generally WILLIAM P. MCNEILL, *LEX POPULI: THE JURISPRUDENCE OF POPULAR CULTURE* (2007); STEVE REDHEAD, *THE BIRTH OF LAW AND POPULAR CULTURE* (1995); RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW & POPULAR CULTURE* (2000); Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 LAW & SOC. INQUIRY 139 (2002) (reviewing RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW & POPULAR CULTURE* (2000)).

18. See SLOTKIN, *supra* note 4, at Part III.

19. See *id.*

20. See Reichman, *supra* note 17, at 459.

21. See *id.* at 458-59; see also Silbey, *supra* note 5, at 151.

“law-in-cinema.”²² As the law and cinema discourse has grown over the past two decades, this sort of analysis has been the most prevalent.²³ Interestingly, recent scholarship suggests that the relationship between the domains of law and cinema is a reciprocal one.²⁴ One recent commentator has said that “law and cinema discourse rests on the observation that both the law and the cinema reside in the same social domain—culture—and therefore each practice influences (and is influenced by) the other.”²⁵ While this claim and the implications of accepting it are controversial,²⁶ I believe there is something important captured in associating law and cinema—as law-in-cinema—and placing them in cultural context.²⁷ It rings true to me that there is some important reason why one of our most important cultural artifacts continually plays with the relationship between justice and the institutions of civil society, and it seems equally plausible to me that the continual telling and retelling of such narratives has an effect on popular conceptions of justice and how it can (and cannot) be attained.²⁸

Given the prevalence of this message, it seems pertinent to question whether the ideal of justice can be attained at all. Certainly, this meta-question lies at the heart of any compelling critique of institutionalized legal structures vis-à-vis popular conceptions of justice. Recent continental philosophy has taken on this line of questioning, specifically problematizing traditional notions of justice. In particular, work by the late French philosopher and social critic Jacques Derrida attempted to treat justice in a distinctly new and alternative way.²⁹ I will review this alternative conceptualization, setting it against the presumption that social and political institutions are incapable of attaining any measure of “true” justice. As part of this analysis, I will discuss the 1962 John Ford film *The Man Who Shot Liberty Valance*³⁰ to illustrate the dilemma

22. See Silbey, *supra* note 17, at 146 (reviewing RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW & POPULAR CULTURE* (2000)). Silbey traces the relationship between law and cinema scholarship and the related but distinct academic treatment of “law-in-literature.” She contrasts this with what she calls “law-as-literature.” The latter is an analysis of the rhetorical and discursive techniques employed in legal texts. *Id.*; see also Reichman, *supra* note 17, at 458-59.

23. See generally Reichman, *supra* note 17; SHERWIN, *supra* note 17.

24. See Lawrence M. Friedman, *Law, Lawyers and Popular Culture*, 98 *YALE L.J.* 1579, 1579 (1989); Reichman, *supra* note 20, at 460-63; Suzanne Shale, *The Conflicts of Law and the Character of Men: Writing Reversal of Fortune and Judgment at Nuremberg*, 30 *U.S.F. L. REV.* 991, 991 (1996).

25. Reichman, *supra* note 17, at 460.

26. See generally Silbey, *supra* note 17, at 146 (reviewing RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW & POPULAR CULTURE* (2000)).

27. See Reichman, *supra* note 17, at 489-96 (describing use of cinema to explore law).

28. See *id.*

29. See Jacques Derrida, *Force of Law: The ‘Mystical Foundation of Authority’*, in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3-67 (Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson eds., 1994).

30. *THE MAN WHO SHOT LIBERTY VALANCE* (Paramount Pictures 1962). There are several good discussions of the themes and ideas expressed in this film. I think the best is Ryan, *supra* note 13, at 23-43. See also TAG GALLAGHER, *JOHN FORD: THE MAN AND HIS FILMS* 385-413 (1986); WILLIAM LUHR AND PETER

commonly associated with trying to use law to achieve justice. Then, I will offer an alternative reading of the film that utilizes the Derridian notion of justice, questioning whether this alternative provides us with a more plausible and compelling interpretation of common presuppositions about the chance of achieving justice in or through social and political institutions, specifically the legal system.

I will then move to a related question about the possibility of attaining justice in the institutional structures of civil society: if the law cannot effect justice, should those outside the law act to bring it about? This question relates to the issue of vigilantism (and perhaps even to what has been called "popular justice").³¹ This is a direct and natural implication of the myth discussed above—i.e., because the law is ineffective at bringing about justice, someone outside the law must act in the name of justice. The hero, in these narratives, is a beneficent vigilante. Does this mean that justice is the domain of those who stand outside the established legal order? I will briefly discuss the conceptualization of popular justice developed by Michel Foucault and others to fill out this notion of popular justice.³² This will also provide a framework for evaluating the 1968 film *Hang 'Em High*.³³ This film, starring Clint Eastwood, problematizes the vigilante narrative by reinserting the protagonist into the role of a representative of the legal establishment (almost against his will; he *wants* to be a vigilante because then justice can really be done).

Finally, I will conclude by discussing the intersection of attaining justice—both institutional and popular—and the role of the actor (formal, institutional, and cinematic personification) in giving rise to this critical cultural touchstone. In the end, watching movies about the impossibility of attaining justice through institutional mechanisms may not tell us what justice is, or how to get it, but it does tell us something about how those in our culture conceptualize the role of civil institutions.³⁴ It also might just tell us something about our heroes and their tenuous relationship to civil society.

JUSTICE DENIED

As *The Man Who Shot Liberty Valance* opens, a stagecoach is stopped in the wilderness by a group of masked men. Among the passengers is Ransom (Ranse) Stoddard, a well-dressed young lawyer hoping to make his mark on the West. The world which Ranse Stoddard (played by Jimmy Stewart) enters when he exits the stagecoach, in reply to the "invitation" of the desperado

LEHMAN, AUTHORSHIP AND NARRATIVE IN THE CINEMA 45-84 (1977).

31. See ALAN NORRIE, *LAW AND THE BEAUTIFUL SOUL* 33-49 (2005).

32. Michel Foucault, *On Popular Justice: A Discussion with Maoists*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977* 1-36 (Colin Gordon ed., 1980).

33. *HANG 'EM HIGH* (Leonard Freeman Productions 1968).

34. See Silbey, *supra* note 5, at 151.

Liberty Valance (Lee Marvin) and his cohorts, however, is radically different than that which he has known before. Ranse is an Easterner trained by one of the legal institutions whose very purpose is to instill the idea that justice can be achieved through and in the law. He is, for all intents and purposes, the personification of the Western liberal legal tradition—a tradition that maintains that the constructions of the legal system (and other social institutions) are universal and supreme and that such constructions in fact define what operative concepts mean.³⁵ Justice, in short, is what the law says it is.³⁶ The law, on this view then, defines reality.³⁷

The frontier, however, is quite different as Ranse would soon find out. Absent the confines of “civilized” life, where people buy into the idea that justice can be found in the law (where they accept without question the reification of legal categories), Ranse’s ideological worldview begins to crumble. Justice on the frontier is no longer what the law says it is—for the law as it is represented by the institutions of civil society (metaphorically represented in the film as that found in law books) is feeble, it can be torn apart and discarded at will. Instead, the law is something beyond the confines of any institutional framework.³⁸ Justice, on the frontier, seems to be an ideal that is more related to popular morality and cultural mores than to any kind of established legal order. Indeed, justice is something that must be fought for extra-institutionally.³⁹ We see this from the initial scene when Ranse is bushwhacked by Liberty Valance, although Ranse himself does not realize it until sometime much later.

When Ranse arrives in the frontier town of Shinbone he is determined to use the law to bring Valance and his gang to justice for robbing the stagecoach and humiliating the passengers. The town marshal, Link Appleyard (Andy Devine), refuses to confront Valance. In fact, he flees the scene when Valance and two of his goons (played by Strother Martin and Lee Van Cleef) again assault and humiliate Ranse.⁴⁰ Ranse’s foray into law practice yields similar results. Throughout all of this, Tom Doniphan (John Wayne), a truculent and cynical cowpoke that lives on the edge of town, repeatedly tries to convince Ranse that the law can never stop people like Valance.⁴¹ Indeed, Doniphan even goes so far as to suggest that people like Ranse do not belong on the Frontier.⁴²

Ranse must realize that the law as he knows it (as a formalist enterprise) is

35. See Ryan, *supra* note 13, at 32.

36. This is the idea expressed by the judge (Pat Hingle) in *Hang ‘Em High* when he says, “Justice is my province; mine and mine alone!” See *HANG ‘EM HIGH* (Leonard Freeman Productions 1968).

37. See Ryan, *supra* note 13, at 29-30.

38. *Id.* at 25-26.

39. *Id.* at 26.

40. *Id.* at 26, 34.

41. See Ryan, *supra* note 13, at 37.

42. *Id.*

feeble on the frontier before he can truly effect justice in Shinbone. He must put down his law books and pick up a gun.⁴³ This is a symbolic act of foundational violence that might signal the eventual importation of the legal values he has left behind,⁴⁴ but one that nonetheless recognizes the inability of law to provide for a just resolution to the conflict(s) brought on by the actions of the outlaw Liberty Valance.⁴⁵ So Ranse must himself go outside the law (or at least try to) in order to effectuate justice. A situation that makes a hero of him, even though he was not in reality responsible for the death of Liberty Valance.⁴⁶

A similar message can be read in other movies in the Western genre. In the picture *High Noon*,⁴⁷ for example, Marshal Will Kane—who has in the past followed the law and worked through its established procedures—must literally quit his post before he can *actually* effect justice.⁴⁸ The law has had its chance to bring the outlaw Frank Miller and his band of marauding riffs to justice, but it has failed. This failure, in a sense, implicates Kane and anyone else who maintains blind allegiance to the law and its institutions.⁴⁹ Any true approximation of justice, then, needs to be brought on independently of the framework and procedures of the legal system. Here again justice is brought about with a gun and brought about by an outsider. Kane must reject his previous reliance on the law and meet violence with violence if the town of Hadleyville is to be saved, seemingly the only way in which to bring about justice on the frontier.⁵⁰

One might infer from these examples of popular culture that the notion that law can bring about justice is bankrupt in our society—that the social, political,

43. The fact that the attainment of justice (to the extent that justice can in fact be attained) is almost always associated with violence is extremely troubling. Richard Slotkin identifies this as "regeneration through violence," which he associates with the myth of the frontier. On the frontier, according to this myth, important virtues (which have been lost in or suppressed by the civil society found in cities) can only be regenerated through violent acts. SLOTKIN, *supra* note 4. While he undoubtedly correctly identifies this phenomenon, I am convinced that this association between violence and justice (a virtue as defined) could be more completely problematized by Slotkin. Cheyney Ryan does a better job of this. See Ryan, *supra* note 13, at 23-25.

44. See *The Critique of Violence*, in WALTER BENJAMIN, REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277-300 (Peter Dementz ed., Edmund Jephcott trans., 1978) (describing need for founding act of violence in any established social structure); see also RICHARD BEARDSWORTH, DERRIDA & THE POLITICAL 98-100 (1996); Jacques Derrida, *Déclarations d'indépendance*, in JACQUES DERRIDA, OTOBIOGRAPHIES: L'ENSEIGNEMENT DE NIETZSCHE ET LA POLITIQUE DU NOME PROPRE (1984).

45. The term "outlaw" here cannot necessarily connote any derisive quality as the "hero" also must go outside the law in order to bring about justice. This seems to dissolve the traditional dichotomy between the good guy and the bad guy in a way that places typical value judgments in question. While beyond the scope of this paper, it is this sort of move that worries critics of deconstruction who question the ability of deconstructive projects to account for ethics in any meaningful way.

46. Tom Doniphon actually murders Valance.

47. HIGH NOON (Stanley Kramer Productions 1952).

48. See Ryan, *supra* note 13, at 38.

49. *Id.*

50. *Id.* Even his Quaker wife (played by Grace Kelly) accepts this premise at the end of the movie. *Id.* at 33-34.

and legal institutions found in the United States are widely and rightly regarded as impotent and ineffectual.⁵¹ While there are more than a few indications that this kind of sentiment is taking hold with increased regularity, the traditional association of law and justice still holds sway.⁵² This is especially true within the institutions in question.⁵³ American legal institutions, such as law schools and courtrooms, and the theorizing that goes on in and behind them, still largely clutch at the presumption that what the law defines as just is in fact just.⁵⁴ The people who taught Ranse are still teaching us. But ambivalence remains; some people still question this account of things. This creates both institutional and social tension.

This is evidenced, at least in part I think, by the fact that the sort of cultural critique I have outlined above is most often found in artifacts that deal with the margins of civilization.⁵⁵ It seems altogether more acceptable to question the ability of legal institutions to effect justice on the frontier than in the heart of society's cities.⁵⁶ The presumption that the law is not equipped to do justice in the wilds on the edges of civilization resonates with us, but not nearly enough to make us confront the fact that the "fully formed" legal institutions that are found in polished society are ultimately as feeble as those found in Shinbone or Hadleyville. This is not to say that we would not find a closer approximation between law and justice in a legal institution of greater relative sophistication.⁵⁷ Certainly, I believe that we do in fact find something that more closely resembles the traditional notion of justice in those institutionalized frameworks that have evolved beyond the Kangaroo courts one would often have found on the frontier.⁵⁸

In a way, however, this begs the question. We are attempting to discern whether it is possible for the law to effect justice, not whether one form of law comes closer to justice than another. If law cannot bring about justice, if it is conceptually incapable, then why haggle over the degree of failure involved in different formulations? Shouldn't we rather discuss the relationship between law and justice in such a way as to see if law and legal institutions help or hinder our quest for justice?

51. The work that comprises the corpus sometimes known as "Critical Legal Studies" addresses this position. See generally MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

52. Critiques of the Western liberal conception of law are still seen as marginal.

53. Legal scholarship within the legal academy has been particularly slow to engage in a self-critical stance.

54. For a representative discussion of the different accepted positions within Western liberalism on justice, see M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* ch. 7 (7th ed. Sweet & Maxwell, Ltd. 2005).

55. See SLOTKIN, *supra* note 4, Part III.

56. Other film genres problematize the association between justice and law in contexts that are not as marginal, however. "Film Noir" movies, for example, frequently take place in cities and also deal with the issue of justice. My comments here, then, are not meant to be universal.

57. See NORRIE, *supra* note 31, at 33-36.

58. *Id.*

Such a discourse underlies some cultural examinations of this dilemma—as I have mentioned—suggesting that the traditional Western notion of law is a hindrance to the attainment of justice.⁵⁹ At least the two movies mentioned above can be explicitly read this way. Ransie is hamstrung by his reliance on the law, as is Will Kane. It appears as if both of these characters need to move beyond the law in order to bring about true justice.⁶⁰ They need to take matters into their own hands if justice is to be served.⁶¹ These characters perceive that they must become legal outsiders to bring about justice. The law—the institution of the established order—has failed them.

This theme is problematic on several levels. We have been conditioned to think that justice is the providence of the institutional structures that exist within civil society. Yet at some deeper level, almost all of us probably recognize that the concept of justice transcends the positivist legal constructs that exist within our political and social institutions. Going outside the law, though, suggests that this form of justice is illicit and will be condemned by those in the established order.⁶² Our traditional notions of justice, especially those based in some concept of the fairness of institutional procedures,⁶³ would suggest that this “outsider justice” is just another form of lawlessness. So our common conception of justice, at least the conception that prevails in most Anglo-American jurisprudence, leaves us with a dilemma. Can people outside the legal system actually effect justice? If so, doesn't that undermine our sense of legitimacy in the system itself?⁶⁴

I believe there is a way to circumvent this dilemma, but in order to do so we must develop a more sophisticated notion of justice than the one that prevails in most of the Anglo-American tradition. Recent work by the French philosopher Jacques Derrida could aid us in this endeavor.⁶⁵ In his essay *Force of Law: The “Mystical Foundations of Authority”*, Derrida attempted to delineate a notion of justice that expands beyond the horizons of the formalist attempts to equate law and justice.⁶⁶ For Derrida, law is merely a human construct, which can either hide or reflect the interests of certain segments of society, but is in no real way *necessarily* associated with justice. Indeed, the conflation of law with

59. *Id.*

60. See Ryan, *supra* note 13, at 30.

61. *Id.*

62. We will see this reemerge later in the discussion surrounding vigilantism and popular justice.

63. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1973) (describing justice as element of social institution); JOHN RAWLS, *JUSTICE AS FAIRNESS* (2001) (reforming notion of justice as political concept); JOHN RAWLS, *POLITICAL LIBERALISM* (2005) (discussing justice in light of politically liberal societal framework).

64. See Ryan, *supra* note 13, at 26.

65. See Derrida, *supra* note 29.

66. See generally RAWLS, *supra* note 63. But see DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (Drucilla Cornell, Michel Rosenfeld, & David Gray Carlson eds., 1992); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988) (critiquing liberalist notion of justice espoused by Rawls and his followers).

justice is to confuse a performative convention with a “juridico-ethico-political” relationship.⁶⁷ In short, law can (and should) be deconstructed, whereas justice cannot.⁶⁸ Justice, for Derrida, is the process of deconstructing human social constructs (not just law and legal institutions, but other social frameworks as well) in order to allow the particular engagement of one individual with another.⁶⁹ Deconstruction *is* justice.⁷⁰ On this view, justice is something beyond the realm of human constructs that must be strived toward in an attempt to form an ethical relationship with the other.⁷¹

It should be clear that on the Derridian account law and justice cannot be conflated.⁷² John Caputo says, for instance, that on Derrida’s reading, “Justice eludes law and philosophy, exceeding and transcending them, and often enough transgresses them. For often enough it is necessary, for the sake of justice, to break the law”⁷³ Likewise, Derrida’s notion of the relationship between law and justice breaks radically from traditional Western liberal accounts.⁷⁴ Traditionally, Western liberal theory maintains that law is the mechanism through which justice is to be brought about.⁷⁵ For Derrida, though, law is simply authority backed by a legitimating force.⁷⁶ Traditional Western legal theory, then, is the attempt to universalize principles about the application of this force.

The relationship of justice, though, is not one which is characterized primarily by force. It is instead an ethical association on the level of

67. See Derrida, *supra* note 29, at 5.

68. See *id.* at 14 (stating justice not deconstructible). This claim has exposed Derrida to the criticism that his notion of justice is tacitly Platonic (“ideal form”) or Kantian (“regulative ideal”) in nature. See Douglas Litowitz, *Derrida on Law and Justice: Borrowing (Illicitly?) from Plato and Kant*, 8 CANADIAN J.L. & JURIS. 325 (1995). This criticism warrants reflection as Derrida has elsewhere explicitly rejected the logocentric and transcendental schemes that underlie Platonic and Kantian conceptions of justice. See *id.* at 325. It need not necessarily detain us here, however, as the criticism itself falls into the error of mistaking a relationship with an ideal category. The former is distinctly Levinasian, while the latter is associated with Plato, Kant, or both.

69. Derrida, *supra* note 29, at 17.

70. *Id.* at 15.

71. See CAPUTO, *supra* note 1, at 194. Derrida draws this formulation, at least in substantial part, from the work of Emmanuel Levinas. See generally EMMANUEL LEVINAS, HUMANISM AND THE OTHER (Nidra Poller trans., 1972); EMMANUEL LEVINAS, PROPER NAMES (Michael B. Smith trans., 1996); Robert Bernasconi, *The Trace of Levinas in Derrida*, in DERRIDA AND DIFFÉRENCE (Robert Bernasconi and D. Wood eds., 1985).

72. See Derrida, *supra* note 29, at 16.

73. See CAPUTO, *supra* note 1, at 189.

74. Derrida does not want to make the claim that law and justice are in no way related. In fact, he explicitly recognizes that it is just that there is law. He merely wants to illustrate that law as a human construction is flawed and limited to the extent that justice is necessarily beyond law and independent of any such human construction. See Derrida, *supra* note 29, at 16.

75. See JOHN RAWLS, POLITICAL LIBERALISM (Columbia Univ. Press 2005) (clarifying distinction between moral and political doctrines of justice).

76. See *id.* Derrida is, of course, not unique in this criticism. Marxist legal theory has leveled this claim at liberalism for some time. See Alan Hunt, *Marxist Theory of Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 355, 362 (Dennis Patterson ed., 1999).

particularity.⁷⁷ Justice is the voluntary giving over of one's self to the other in such a way as to recognize and sanctify their humanity.⁷⁸ Derrida says, for example, that

justice . . . operates on the basis of an infinite "idea of justice," infinite because it is irreducible, irreducible because owed to the other, owed to the other, before any contract, because it has come, the other's coming as the singularity that is always other. This "idea of justice" seems to be irreducible in its affirmative character, in its demand of gift without exchange, without circulation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without rationality."⁷⁹

It would be impossible, under Derrida's formulation, to universalize this in a manner consistent with institutionalized performativity, i.e., law.⁸⁰ This is illustrated by his primary example of what he means by justice: the free and open willingness (and ability) to speak to the other in her own language—something that only makes sense on the level of individual particularity.⁸¹

Herein lies the problem, though. There are undoubtedly going to be those instances where the giving will not take place. People are not always so forthright as to freely enter into the kind of ethical relationship of which Derrida speaks. Indeed, this is undoubtedly the first objection a supporter of the liberal paradigm would advance. To this Derrida might respond that people are surely not forced to assume a relationship of ethical particularity (to do so would vitiate the purposeful and voluntary nature of the relationship), but the resulting confrontation is not something that can be discussed in terms of justice. These sorts of conflicts are undoubtedly a part of human existence, but a part to which the notion of justice is inapplicable (and in a sense, incommensurable). Law has its clearest applicability in these instances.

On my interpretation, Derrida's notion of justice is not a social or political ideal (as we would find in Western liberalism), but is instead an individual particularized ethical relationship with the other. Because laws are necessarily

77. Caputo articulates this concept in the following passage:

Proper names are not only ways of calling others but ways of being called by others and responding to what calls for recognition, what calls for justice. The law must blind itself to proper names. The law (*droit*) must be written without proper names, whereas justice must always come as a response to proper names.

CAPUTO, *supra* note 1, at 205.

78. Caputo characterizes this nicely when he says that "[j]ustice is not to be recalled but invented in the moment, which is but a small break or crevice in the textuality of everyday life." *Id.* at 191.

79. See Derrida, *supra* note 29, at 25.

80. *Id.* at 17.

81. *Id.*

universalized principles, their applicability in such instances is nonexistent. The converse is not necessarily the case, however. Justice can and does have far-reaching implications for law. This relationship of justice can guide and inform the crafting, invocation, and application of laws. Further, the notion of justice that Derrida advances can guide us in formulating alternative legal structures and institutions that are more in line with the widespread adoption of the ethical relationship which Derrida (and one of his principal intellectual progenitors, Emmanuel Levinas) proposes. Viewed in this way, the Derridian notion of justice can be used to form and restrain laws, as opposed to the traditional view that laws are formed to achieve justice.⁸² A barely perceptible shift in perspective, but one which could have far-reaching implications.

The idea that justice can have an effect on law is an extremely important point for Derrida.⁸³ For if this were not so, there would be no reason to engage in juridico-political discourse.⁸⁴ Ethical dialogue would be all that is necessary.⁸⁵ But as I have suggested, justice does not fill as large a field on the conceptual landscape as traditional liberal theorists would have us believe. Drawing from this liberal heritage, many of the ideas that we have historically associated with justice are really other social, political, legal, and psychological concepts disguised and concealed beneath the sugar-coating of liberal assumptions and bias. Much of what is popularly considered justice, for example, could perhaps more accurately be described as institutionalized oppression, procedural advantage, or outright revenge. That a system that contains such marked flaws would wish to dress them up in a way that conceals the glaring imperfections ought not seem unusual, but that we accept the package so unhesitatingly should cause considerable concern.

On the alternative account of justice that Derrida provides, it is indeed the case that justice cannot be found in or through the law. So the inclinations of our Western characters Ransie Stoddard (and Will Kane) turn out to be correct. The legal system is impotent when it comes to justice. Instead of searching for justice in the courts, Ransie and characters like him in many Westerns must seek it individually. Superficially, then, it appears that the themes we find in these Western films are proto-Derridian in that they deny that law is a proper (or possible) mechanism to attain justice. They maintain that the only possible route to justice is through individual engagement with the other. But this seems to be as far as we can take the analogy.

The confrontation of the other that we find in these films is by no means the kind of ethical relationship that Levinas and Derrida want to suggest. The seeking out of those who have visited violence upon us in order to repay that

82. See CAPUTO, *supra* note 1, at 195.

83. See Derrida, *supra* note 29, at 16-17.

84. Drucilla Cornell has an excellent discussion on this. See DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* (1992).

85. See Derrida, *supra* note 29, at 21.

violence in-kind is radically different than the willingness to talk to the other in her own language. On a truly Derridian account, then, this is not justice at all. It may be a psychological need for revenge, but justice is in no way implicated in this cycle of violence.⁸⁶

But there is something prevalent about the idea that revenge is justice. In fact, many of the Westerns that play with this theme suggest that the bad guys should get their comeuppance even when the law does not provide an avenue for this. Many of these films use this as an opportunity for exploring the role of vigilantes—the consummate outsiders—in bringing about justice. These films are interesting in that they deal directly with the dilemma of acknowledging the fact that the established institutions of civil society cannot bring about justice. But if there is such a thing as justice, who can effect it? In the next section I look at the movie *Hang 'Em High*, which is particularly interesting in this regard because it problematizes not only the institutionalization of justice, but also the issues of role, authority, and popular justice, all while exploring the notion of outsider status.

AGENTS OF JUSTICE

The question of who can, or should, bring about justice, if the agents of the state cannot do so, is a philosophically complex one. The fact that the corpus of the Western liberal legal tradition has completely erased this question is some indication of its centrality to alternative conceptions of justice.⁸⁷ Given this erasure, it seems natural that our non-institutional cultural artifacts would re-inscribe the question and attempt to deal with its complexities. The 1968 Ted Post film *Hang 'Em High* is just such an artifact.

Just as *The Man Who Shot Liberty Valance* opens with a dramatic confrontation on the prairie between a lawless band and an innocent bystander, *Hang 'Em High* begins with Jed Cooper (played by Clint Eastwood) being confronted and questioned by a group of armed men (played by, among others, Ed Begley, Sr., Alan Hale, Jr., and Bruce Dern). The men are ostensibly a posse looking for the outlaw who murdered a local rancher and his wife and stole the murdered couple's cattle. The cattle that Cooper has in his possession are in fact from the murdered man's ranch. This is taken as proof that Cooper committed the crime, and the posse hangs him from the nearest tree.

Cooper was innocent, however. The posse, we learn as the tale unfolds,

86. Derrida's discussion of justice in "Force of Law" has been criticized as a tacit endorsement of violence. See Dominick LaCapra, *Violence, Justice and the Force of Law*, 11 CARDOZO L. REV. 1065 (1990). Essentially the critical claim is that Derrida does not exclude this sort of violent confrontation from his conceptualization of the engagement of the other. It seems a weak assault, however, as Derrida explicitly speaks of an ethical relationship on Levinasian terms (which explicitly denies the affability of violence). Drucilla Cornell offers an admirable defense of Derrida against this criticism in *The Philosophy of the Limit*. See CORNELL, *supra* note 84.

87. See NORRIE, *supra* note 31, at 44.

acted precipitously and hung the wrong man. Cooper had bought the cattle from the real perpetrator. The justice the posse sought for the murdered man and his family was misplaced. The vigilante group, acting to bring about popular justice for those who could not turn to the law (the territory has only one judge and a few marshals), had carried out an unjust act. This opening sequence seems to reinforce the traditional criticism of vigilante—or mob—justice: the mob is usually wrong! Because the mob mentality is so prone to mistake (or worse), the message is that it is better to leave justice to the legal institutions of civil society.

But the issue, as we learn throughout the rest of the film, is much more complex than this. Cooper does not die from his lynching. Instead, one of the territorial marshals (played by Ben Johnson) happens upon him in time to cut him down and save his life. Interestingly, however, the marshal handcuffs Cooper and takes him to the territorial seat. Cooper is told that if he is innocent, the judge will set him free; if not, they will have to hang him again! Cooper is, of course, innocent and the federal judge (portrayed by Pat Hingle) does set him free (just in time to see the real killer hang on the official state gallows). Here again the message seems to be that the state can, and does, bring about justice. In fact, the judge tells Cooper that he, as the duly appointed representative of the state, will bring the men who lynched Cooper to justice. But this message is superficial. Things are not so simple. Cooper doesn't buy it.

This exchange with the judge is interesting in that it sets out the principal dilemma of the film (and of this article): if the law is not able to bring about justice, what can—or should—we do about that? Ultimately, Cooper is persuaded by the judge to enter the law—he becomes a federal marshal—in order to avenge his lynching and near fatal hanging.⁸⁸ There is no pretense here. Cooper's only interest is to find and punish the men who lynched him. He pins on the badge not because he maintains any idealistic assumptions concerning his ability to bring about law and order (justice in the traditional view), nor because he believes that the law can bring those who assaulted him to justice (for he knows that law is feeble in this regard). Instead, he assumes the persona of an agent of the establishment in order to give him the room to bring about what he considers to be true justice. He is, in short, taking advantage of the gap between law and justice for personal reasons. Essentially, he is a vigilante acting under color of law. As we might expect, the "true" justice meted out by Eastwood's character is swift and violent (much to the profound consternation of the judge who has employed Cooper and who has his own brand of justice in mind).

The notion that justice is attainable only through extra-institutional means is

88. *HANG 'EM HIGH* (Leonard Freeman Productions 1968). Indeed, we learn early on that Cooper had previously been a law man, but he seems to have left the profession with a less than satisfied taste in his mouth.

not a new one. In fact, many theorists have explored this theme as a counterpoint to the formalism of Western liberalism. In its most prominent form, vigilantism, this idea shows up over and over again in our popular imaginations.⁸⁹ While many may feel that the actions of vigilantes can more closely approximate justice, we are often left feeling that vigilantes are themselves acting in socially problematic ways. They are, in a very real sense, the quintessential outsiders. This creates tension within our conceptual frameworks. We root for vigilantes because they protect things that must be protected and try to bring about just resolutions to our problems, but we cannot fully support and encourage them because this would undermine our sense of security in established institutions.⁹⁰ In effect, this tension points to the seemingly innate human desire to have our cake and eat it too. This same tension also relates to our suspicion about established and entrenched power relationships. This certainly seems to be the position of the late French theorist Michel Foucault.⁹¹

In critiquing the ability of established legal institutions to bring about justice, Foucault promoted the notion that only the people themselves, acting outside the bounds of the established institutions of civil society, can effect justice.⁹² These institutions of civil society, especially the judiciary, which he maintains a particular suspicion of and contempt for,⁹³ are forever beholden to

89. Depictions of this notion are particularly prevalent in films. *See, e.g.*, DEATH WISH (Dino DeLaurentiis Company 1974) (recounting story of New York architect who becomes vigilante); DIRTY HARRY (The Malpas Company 1971) (following renegade police officer in attempting to apprehend serial killer); FALLING DOWN (Alcor Films 1993) (portraying unemployed defense worker's psychological breakdown and violent reaction); MAD MAX (Kennedy Miller Productions 1979) (depicting efforts of police officer to avenge family's death); SHAFT (Metro-Goldwyn Meyer 1971) (depicting private investigator hired by criminals to retrieve kidnapped daughter); TAXI DRIVER (Bill/Phillips 1976) (showing unstable war veteran violently lashing out at society); THE BOONDOCK SAINTS (Franchise Pictures 1999) (chronicling efforts of two brothers to bring justice to city of Boston); THE OUTLAW JOSEY WALES (The Malpas Company 1976) (portraying farmer who joins Confederate guerilla unit). This theme is also quite prevalent in comic books. *See* Anthony Walker, *Is the Justice Viewed Through the Eyes of Comic Book Vigilantes Truly Just?*, available at http://www.thepunisher.com/past_news/december_2007/JusticeViewedThroughtheEyesofComicBookVigilantes.doc (last visited May 30, 2009).

90. This is the bind that the Stan Lee created character Spider-Man frequently confronts. In both the comic book and film incarnations, the people of New York need Spider-Man, but he is also shunned and reviled as a menace. *See* SPIDER-MAN (Columbia Pictures 2002).

91. *See* Foucault, *supra* note 32.

92. *See id.* at 3.

93. *See id.* at 4-5. Foucault says, for example, that

The court, dragging along with it the ideology of bourgeois justice and those forms of relations between judge and judged, between judge and the parties to the action, between judge and litigant, which typify bourgeois justice, seems to me to have played a very significant role in the domination of the bourgeoisie.

Id. at 27.

the status quo (meaning, in his critique, the dominant class).⁹⁴ Foucault advocates what he called “popular justice.”⁹⁵

Popular justice has been defined as a non-institutionalized (some might say other-institutionalized) brand of justice whereby matters are taken into the hands of the people.⁹⁶ This power to effect justice is seen as more complete and expedient than what state institutions can offer or provide.⁹⁷ In the literature of modern sociology, popular justice is more related to quasi-formal mechanisms found in non-Western or indigenous social groups.⁹⁸ People’s Courts or Star Chambers are examples.⁹⁹ Seen in this way, popular justice movements are associated with grassroots bands of individuals who form an “alternative jurisprudence.”¹⁰⁰ This alternative jurisprudence maintains at least some form of procedure.¹⁰¹ The procedure is one that simply differs from the positivist notions found in Western liberalism.¹⁰² This is not at all what Foucault has in mind.¹⁰³

For Foucault, the consolidation of power into any established structure—any sort of formal apparatus—is just a remaking of the problematic structures of the bourgeois state.¹⁰⁴ What Foucault was championing is the people acting as their own instruments of justice.¹⁰⁵ This has been equated to “mob rule,”¹⁰⁶ but that does not seem to bother Foucault.¹⁰⁷ What Foucault was pointing to is taking the issue of justice into one’s own hands because the institutions of the (bourgeois) state will not and cannot be concerned with justice.¹⁰⁸ Interestingly, the example that Foucault uses is the punishment of French and Belgians who collaborated with the Nazis.¹⁰⁹ At the conclusion of World War II, these collaborators (especially women) were not punished by the Allies nor by the re-forming French and Belgian governments. Instead, they were sought out and punished by the people themselves, people who had not collaborated

94. See Foucault, *supra* note 32, at 6.

95. See *id.*; see also NORRIE, *supra* note 31, at 37-38 (discussing Foucault’s position on popular justice).

96. See NORRIE, *supra* note 31, at 43-44. A good discussion of this concept and its use in popular films can be found in Anthony Chase’s article *Popular Culture/Popular Justice* in LEGAL REELISM, 133-53 (John Denvir ed., Univ. of Illinois Press 1996).

97. See NORRIE, *supra* note 31, at 46.

98. See *id.* at 33-36.

99. See Anthony Chase, *Popular Culture/Popular Justice*, in LEGAL REELISM 134 (John Denvir, ed., Univ. of Illinois Press 1996) (noting far right popular justice movements often used as examples).

100. See *id.*

101. NORRIE, *supra* note 31, at 46.

102. See *id.* at 44-47 (comparing Western liberalism to alternative justice).

103. Foucault, *supra* note 32, at 1-6 (arguing popular justice should not adopt any procedure resembling state judicial apparatus).

104. *Id.* This is, of course, a traditional Marxist critique of the Western liberal legal establishment.

105. *Id.*

106. See NORRIE, *supra* note 31, at 49.

107. See Foucault, *supra* note 32, at 1-6.

108. *Id.*

109. *Id.* at 9-11.

and suffered at the hands of the Nazi occupiers.¹¹⁰

All of this is laced, of course, with Marxist revolutionary undertones, but it need not be.¹¹¹ The sociologist Steven Spitzer has explained this dynamic in the following way:

If . . . an "ethos"—not to speak of instincts—takes hold of the masses on some individual question, it postulates *substantive* justice oriented toward some concrete instance and person; and such an "ethos" will unavoidably collide with the formalism and the rule-bound and cool "matter-of-factness" of bureaucratic administration.¹¹²

Therefore, this non-institutionalized notion of popular justice, according to Foucault and Spitzer (among others), can be aimed by the people at individuals who would escape justice in the established institutional arrangements of civil society or in situations where the established institutions are defunct or have been destroyed by revolutionary or other popular action.

But does this mean that individuals are empowered to act on their own to right the wrongs that have been done to them? Foucault seems to reject this form of direct individual vengeance.¹¹³ In fact, vigilantism—and by extension Foucault's notion of popular justice—seems to be based on the notion that vigilantes act on behalf of some larger principle that transcends any individual's particular grievance.¹¹⁴ The vigilante is not a neutral party mediating disputes but an agent for the aggrieved.¹¹⁵ This is, in substantial part, what makes them outsiders. They are outside the legal establishment, to be sure, but they are also outside the bounds of the conflict itself.

This may seem an odd notion of justice. If we look at this in light of what Derrida had to say about justice, however, an interesting thing occurs. I said above that under Derrida's formulation, justice is the process of deconstructing the dynamics of a conflict. It is not an ideal that formal institutional structures can attain, nor even approach. Instead, it is left to the agents within the social group to engage an ethical relationship (one involving otherness) that will bring about a just resolution to any conflict that might arise (on either a social or individual level). Presumably, popular justice (through an individual vigilante or group) can engage in just such an ethical relationship. This is, in fact, where justice resides. This is unmediated justice, justice in a direct and patent way.

110. An interesting film that deals with this is the recent Paul Verhoeven film *Black Book* (English title). ZWARTBOEK (Sony Pictures 2006).

111. See Foucault, *supra* note, 32, at 27, 29, 31.

112. Steven Spitzer, *The Dialectics of Formal and Informal Control*, in *THE POLITICS OF INFORMAL JUSTICE* 171 (R. Abel ed., 1982).

113. See Foucault, *supra* note 32, at 31-32.

114. There are elements of this in most, if not all, of the films on vigilantism. See *supra* note 89 (enumerating examples of such films).

115. See Foucault, *supra* note 32, at 33.

In Foucault's example, one cannot help feeling that the French and Belgian collaborators got what they had coming, and it was ethically important for the social group that they did. Looked at in this way, both Derrida and Foucault are talking about analogous things: otherness, non-institutionalized action, and substantive (as opposed to procedural) justice.

The movies I have discussed above are infused with these themes. *The Man Who Shot Liberty Valance* deals with them in a direct and easy to see way.¹¹⁶ The conflict between Ranse and Liberty (which is a metaphor for the conflict between social progress and deterioration, between order and disorder, etc.) can only be justly resolved by the outsider, Tom Doniphon. Tom is clearly a vigilante; he does what nobody else seems to be able to do. He has killed the outlaw that is threatening everyone's hopes and dreams. Tom is not acting out of individual hatred for Liberty, nor in response to something Liberty has done to him or someone important to him (in fact, Tom and Liberty seem to have some important things in common), but for a larger more transcendent purpose: because it is the just thing to do.¹¹⁷

The deconstruction here is not between Ranse and Liberty (for Liberty disappears from the scene with his death), but between the vigilante (Tom) and the aggrieved citizens.¹¹⁸ So the ethical relationship that results is not a resolution between the conflicting parties (Ranse and Liberty), but between the conflict and the social unit negatively affected by the conflict. Tom sacrifices himself, in effect, for the betterment of the town and its people. An outsider has to do this, and Tom Doniphon surely fits that profile.

Hang 'Em High is extremely interesting in this regard because it is a much more complex rendering of this dynamic. Jed Cooper was wrongly hanged by a posse, and he wants individual revenge. He takes matters into his own hands, to be sure, but he can only do so by assuming the mantle of authority. He must become a federal marshal to bring the culprits to justice. He is not—as Jed Cooper—a vigilante because he is searching for justice for himself. When he assumes the cloak of authority, however, he creates a gap between himself and the act of bringing about justice. Jed recognizes—whether out of his own self-interest or for some higher purpose is not clear—that he will have to use his position in order to bring about justice; vengeance will not work. In fact, the judge is constantly assailing Cooper with arguments against vengeance.

Even though Cooper wears a badge, there is a constant struggle between the judge and his new marshal. In fact, Jed continually displays open contempt for the law, the Judge's authority, and the ability of both to effectively render justice. Jed has assumed the mantle of authority, but make no mistake, he is

116. THE MAN WHO SHOT LIBERTY VALANCE (Paramount Pictures 1980).

117. Among the commonalities is the fact that Tom seems to have almost as much animosity toward Ranse as does Liberty.

118. On a superficial level this might be seen to be Ranse, but really it is the people of the town.

not comfortable in this position. Indeed, he is continually quitting. When he is not quitting, he is openly defying the Judge's constant badgering about how to bring those who hanged him to justice. On the surface, Jed is an ostensible insider; he wears a badge. If we look deeper, however, he fits the profile of the consummate outsider; he has contempt for the law, he circumvents the established institutions at every turn, and he is willing to break the law if that is what it takes to bring about justice. Law is, in a most obvious sense, a hindrance to Jed's goal of exacting vengeance against the men who hanged him. On the margins of society, at least, the institutions of Western liberalism stand in the way of anything that resembles justice. The system cannot and does not allow for justice to be attained.

But what of the usefulness of justice in the crafting of laws and their application in taking care of situations and issues which fall short of the mark? That is to say, if we give room for popular justice to be brought about by legal outsiders, can this ultimately have a formative effect on the institutions of the established system? Can frontier justice change our system for the better? This metamorphosis can be seen, I think, in a scene between Jed Cooper and the judge in *Hang 'Em High*. The judge realizes that Cooper is using the badge in order to seek his revenge and confronts him with the issue of institutional justice. Justice, the judge says, is elusive and perhaps even impossible. But it must be taken into account in the imperfect application of the flawed and insufficient system that is the law.¹¹⁹ Cooper responds with the rejoinder that if this is indeed the case, justice would necessitate that the judge release the one individual who was remorseful enough to turn himself in once he realized that the group of men who assaulted Cooper had hung an innocent man. It is Cooper, the outsider, who recognizes true justice. He instructs the judge, who ultimately relents (after blackmailing Cooper to remain a marshal). It is this sort of engagement, the individualized ethical confrontation that comes closest to the notion of justice we have endorsed. The dialogue between Cooper and the judge is about justice, yet it is extra-institutional. In the end, such an endorsement is arrived at by Cooper and the judge when they agree to try and better the law by always remaining conscious of a notion of justice that seems remarkably Derridian in character. A fitting conclusion, perhaps.

CONCLUSIONS

Justice has historically played a large part in Western paradigms of jurisprudence. Indeed, most such paradigms are supposedly constructed in such a way as to use laws, and the legal system in general, to bring about

119. John Caputo sums up the judge's dilemma nicely when he says that "[e]very decision worthy of the name, every decision which 'cuts,' which must give itself up to the 'impossible decision,' is haunted by the ghost, by the aporia of undecidability." CAPUTO, *supra* note 1, at 196.

justice. There are cultural and social assumptions, however, that question whether this arrangement can ever be effected. These assumptions manifest themselves in the media of popular culture. I have argued that this can be seen in Western films, wherein the notion that we achieve justice through law seems to be openly problematized. It seems, on at least one reading of these films, that the law is ineffective—and indeed sometimes obstructive—in this regard. The message, then, is that if justice is to be attained, it must be done outside the institutional and formal structures of law.

This presumption roughly corresponds with recent treatments of the notion of justice from a continental perspective, most notably in the work of Jacques Derrida and Michel Foucault. Derrida's construction of justice detaches any necessary connection between law and justice, maintaining that the former is weak, ineffectual, and flawed, while the latter is transcendent and ideal. Justice, for Derrida, is attained in the ethical engagement of the other on an individual level. Because law is not equipped for such engagements, it is impossible—as Ransie Stoddard, Will Kane, and Jed Cooper had suspected—for justice to be brought about by or through the institutions of law. In Foucault's work we see the preference for individuals acting without the sanction of civil society as agents of justice. This popular justice is, according to Foucault, swifter, more tangible, and more complete. The solitary outsider, living on the fringes of society yet acting (often selflessly) in the pursuit of a higher ideal beyond the bounds of where the established institutions of civil society will allow, can bring us justice. At least that is the message we see.

Conversely, the themes we find in our cultural artifacts will not give us fully formed alternatives to the traditional Western liberal positions. Nonetheless, admitting that there might be alternative notions of justice might (at least in Derrida's account) have an impact on the formation and application of laws. Such an impact would have the most profound effect if the type of ethical relationship offered by Levinas and Derrida were to be taken seriously, for the adoption of this model would surely illuminate the bias and interests that have been cast as justice by traditional Western liberalism. The role of individuals acting outside the established institutions of liberalism is yet to be determined; the script has not been written. But let's roll film, and "print the legend."¹²⁰ It's a start anyway.

120. See Ryan, *supra* note 13, at 38.